TABLE OF CONTENTS

Table of Authorities ii

Rule 29.6 Listing vii

Argument 1

I. The Coal Act Is an Extraordinary Exercise of Legislative Power 1

II. The Coal Act as Applied to Eastern Violates the Due Process Clause 3

A. The Retroactive Imposition of New Liability Raises Serious Due Process Concerns 4

B. There Is No Rational Basis for the Liability Imposed on Eastern 6

1. Mere "Expectations" Cannot Support Eastern's Liability 6

2. Eastern Created No Plan Liabilities 10

3. Liability Cannot Be Justified by Virtue of Any Profit or Other Benefit Derived by Eastern 10

C. The Coal Act Was Mere Political Expediency 12

III. The Coal Act Effects a Taking 13

A. The Coal Act Is More Than Ordinary Regulation of Eastern's Property 13

B. The Nexus Requirement Is Applicable and Is Not Satisfied 15

C. The Coal Act Interferes with Eastern's Investment-Backed Expectations 17

Conclusion 20

TABLE OF AUTHORITIES

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 16

Babbitt v. Youpee, 117 S. Ct. 727 (1997) 17

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) . 5

Bowsher v. Synar, 478 U.S. 714 (1986) 12

Brusaber v. Union Pac. R.R., 240 U.S. 1 (1916) 14

City of Boerne v. Flores, 117 S. Ct. 2157 (1997) 2

Concrete Pipe & Prods. v. Construction Laborers Pension Trust., 508 U.S. 602 (1993) ..... *passim*

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) ..... *passim*

Dolan v. City of Tigard, 512 U.S. 374 (1994) 15

Elliot Coal Mining Co. v. OWCP, 17 F.3d 616 (CA3 1994) 8

FHA v. Darlington, Inc., 358 U.S. 84 (1958) 18

Hodel v. Irving, 481 U.S. 704 (1987) 15

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 4

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) .. *passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 14

McKesson Corp. v. Division of Alcoholic, Beverages & Tobacco Dep't of Bus. Regulation, 496 U.S. 18 (1990) 5

National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry Co., 470 U.S. 451 (1985) 9

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 13, 15, 16

Pennell v. City of San Jose, 485 U.S. 1 (1988) 16

Pennington v. UMWA, 393 U.S. 983 (1968) 6

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 14

Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) 5

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 7

UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 ..... 11, 17

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) .. 16, 18

UMWA v. Pennington, 381 U.S. 657 (1965) 6

United States v. Carlton, 512 U.S. 26 (1994) 5, 9

United States v. Hemme, 476 U.S. 558 (1986) 4

United States v. Lopez, 514 U.S. 549 (1995) 3, 8

United States v. Pewee Coal Co., 341 U.S. 114 (1951) ... 18

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 15

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) ..... *passim*

Washington v. Glucksberg, 117 S. Ct. at 2258 (1997) 4

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 15, 16

Weinberger v. Salfi, 422 U.S. 749 (1975) 3

Yee v. City of Escondido, 503 U.S. 519 (1992) 13

Constitution and Statutes

U.S. CONST. art. I, § 8, cl. 1 14

U.S. CONST. amend. V ..... *passim*

26 U.S.C. § 9701(c)(2) 12

26 U.S.C. § 9704(a) 12

26 U.S.C. § 9706(a), (f)(6) 12

29 U.S.C. § 186 19

Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C., 106 Stat. 3036 (1992) ..... *passim*

§19142(a)(2), 106 Stat. 3037 (1992) 7

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* 9, 18, 19

Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* 18

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 93-363, 94 Stat. 1208 (1980) ..... *passim*

Legislative History

138 Cong. Rec. S10783 (1992) 12

138 Cong. Rec. S17603 (1992) 11

Coal Comm'n Report on the Health Benefits of Retired Coal Miners, Hearing before the Subcomm. on Medicare and Long-term Care of the Senate Comm. on Finance, 102d Cong. (1991) 6

Secondary Sources

BENTHAM'S THEORY OF LEGISLATION (Charles Milner Atkinson ed. & trans. 1914) 4

MORTON S. BARATZ, THE UNION AND THE COAL INDUSTRY (1955) 6

KEITH DIX, WHAT'S A COAL MINER TO DO? THE MECHANIZATION OF COAL MINING (1988) 6

MAIER B. FOX, UNITED WE STAND: THE UMWA 1890-1990 (1990) 6

LON L. FULLER, THE MORALITY OF LAW (1964) 4

GAO, EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE NO. GAO/HRD-90-92 (Mar. 1990) 19

Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301 (1996) .. 4

Pennington v. UMWA, 393 U.S. 983 (1968) (No. 68-558): (i) Br. for Resp. UMWA 6

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 14

STAFF OF HOUSE COMM. ON WAYS & MEANS, 103D CONG., FINANCING UMWA COAL MINER "ORPHAN RETIREE" HEALTH BENEFITS (Comm. Print 1993) 12

UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) (No. 81-61): (i) Br. for Pet. UMWA Health & Retirement Funds, (ii) Br. Amicus Curiae for BCOA 11

UMWA v. Pennington, 381 U.S. 657 (1965) (No. 64-48): (i) Br. for Pet. UMWA, (ii) Tr. of Oral Arg., (iii) Br. Amicus Curiae for BCOA 6

WEBSTER'S THIRD NEW INT'L DICTIONARY (1986) 14

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Eastern Enterprises states that it is a Massachusetts business trust and that it has no parent company or non-wholly owned subsidiary. Petitioner has, however, signed a merger agreement with Essex County Gas Co. ("Essex") and Eastern expects, subject to regulatory and Essex shareholder approval, that Essex will be merged into one of Eastern's wholly owned subsidiaries in mid-1998.

I. THE COAL ACT IS AN EXTRAORDINARY EXERCISE OF LEGISLATIVE POWER.

The Coal Act trespasses to an unprecedented degree upon principles of fair notice, finality, and repose. The Coal Act requires Eastern to respond to a crisis that Eastern did not create, to finance promises Eastern never made, and to do so nearly thirty years after Eastern last employed a coal miner. The Government nonetheless suggests that this Court should approach the Coal Act as a routine legislative adjustment of economic burdens.[1] This treatment of the Coal Act fails to engage the critical features that make the statute an unprecedented and unconstitutional exercise of legislative power.

Unlike typical economic legislation, the Coal Act as applied to Eastern does not regulate ongoing economic activity. Rather, the Coal Act extends a regulatory scheme applicable to current coal operators to companies that have not been involved in the industry or the UMWA benefit plans for decades, and therefore are not engaging in conduct that may be subject to present regulation. This feature of the Coal Act distinguishes it from the regulatory schemes that have generated the precedents relied upon by the Government. In particular, the Coal Act is not like the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), addressed in *Gray*, *Connolly*, and *Concrete Pipe*, that regulated current or future withdrawals from multiemployer pension plans that Congress determined would be harmful to the ongoing stability of such plans. Nor is the Coal Act like the statute reviewed in *Turner Elkhorn*, that required current coal operators to compensate employees for injuries sustained in the course of employment in the coal

---

[1] Eastern responds principally to the arguments presented by the Federal Respondent. These arguments are similar, in most respects, to those advanced by the other Respondents. Where specifically noted, Eastern responds to separate contentions by the Combined Fund and Peabody.

mines. These prior cases evince the latitude afforded to Congress to allocate current economic burdens in the course of regulating ongoing commercial affairs, and to remedy concrete harms caused by past conduct. They do not, however, establish that the Coal Act must be reviewed under a standard of complete deference.

The features of the Coal Act treated as routine by the Government have not been presented in any prior case. There is no dispute that the Coal Act reaches back over an unprecedented span of years to impose new liability with respect to employment transactions that terminated between 1946 and 1965—more than a generation ago. While it is true that Eastern owned a subsidiary until 1987 that continued to mine coal, the "reachback" liability imposed on Eastern arises *solely* from its own employment of miners in years prior to 1966. Nor does the Government contest that the Coal Act was enacted to address a problem of financial instability that arose in the 1980s, or that the benefits offered by the plans had increased dramatically since Eastern last participated in 1965. Finally, there is no sustainable contention that at the time Eastern made its limited contributions to the UMWA benefit plans between 1946 and 1965, any statute or regulation suggested the type of liability imposed in this case. Under these circumstances, any relationship between Eastern and its former employees is so attenuated and insubstantial that the Coal Act goes far beyond requiring Eastern to simply "pay for its own."

The Court has never sanctioned such an utter disregard of the interests of fair notice, finality, and repose. Nor has the Court ever permitted private parties to be so starkly singled out to solve a social problem—the inadequacy of the funding of the UMWA plans in the early 1990s—that they did not create. To the contrary, the Court has repeatedly recognized that even the broadest congressional powers are not unlimited. *See, e.g., City of Boerne v. Flores*, 117 S. Ct. 2157,

2162-64 (1997); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995). The Court could not uphold the constitutionality of the Coal Act without going well beyond its prior precedents, and without leaving Congress with essentially unlimited power to retroactively single out entities for unforeseen liabilities to remedy harms that they never caused.

II. THE COAL ACT AS APPLIED TO EASTERN VIOLATES THE DUE PROCESS CLAUSE.

The Court has recognized that an adequate justification for prospective legislation "may not suffice" for retroactive legislation such as the Coal Act. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). The Government nonetheless insists that the Coal Act should be accorded essentially complete deference, and that virtually any policy justification is sufficient—regardless of its lack of connection to Eastern. As set forth below, the Government's arguments fail to comprehend the basic values that are offended by the Coal Act's extreme retroactivity and its application to Eastern.[2] Further, the Government's position ignores the warning of *Turner Elkhorn* that retroactive liability "unrelated to [the person's] conduct" may violate due process. 428 U.S. at 24. Indeed, properly understood, each of the

[2] The Government incorrectly suggests that, in making an "as applied" challenge, Eastern is seeking an exception to an otherwise reasonable legislative classification. Fed. Br. at 36-37. Unlike *Weinberger v. Salfi*, 422 U.S. 749, 778-779 (1975), upon which the Government relies, this case does not involve a prophylactic measure designed to prevent an "abuse which [Congress] . . . desired to avoid," and thus, does not involve determinations of economic or social policy as to which reasonable minds may differ (such as the age at which a minor should be eligible for a driver's license). Here, Congress has imposed a liability based entirely on past conduct. In such situations, the necessary inquiry is purely historical and ascertainable, and the Court has considered whether individuals or groups, on the facts presented, can rationally be included within the scope of a statute. *See* Eastern Br. at 25 n.41; *cf. Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 636-41 (1993); *id.* at 649 (O'Connor, J., concurring); *Turner Elkhorn*, 428 U.S. at 26 (noting that the outcome of petitioners' due process challenge might have been different on other facts).

Government's proposed justifications for the application of the statute to Eastern is essentially a surrogate for limitless congressional power to enact retroactive legislation.

A. The Retroactive Imposition of New Liability Raises Serious Due Process Concerns.

Whether the retroactive effect of a statute is so harsh and oppressive as to transgress constitutional limitations depends on several considerations.[3] Most important is the character and extent of the retroactivity, and in particular whether it "gives a different and more oppressive legal effect to conduct undertaken before the enactment of the statute." *United States v. Hemme*, 476 U.S. 558, 569 (1986).

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law.

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (citations omitted); LON L. FULLER, THE MORALITY OF LAW 53 (1964) ("[A] retroactive

[3] Eastern's constitutional claim cannot be dismissed pejoratively as an application of "substantive due process," as Respondents and their *Amici* repeatedly attempt. In fact, the primary concern presented by retroactive legislation is essentially procedural—the lack of notice to citizens and their accompanying inability to know the consequences of their actions at the time they act. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation . . . ."). In any event, as Justice Souter recently explained, the Court is often called upon to review the reasonableness of a "legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2281 (1997) (Souter, J., concurring).

law is truly a monstrosity.").[4]

Of course, not every retroactive law is unconstitutional. There are some circumstances when retroactive laws are necessary to the functioning of our legal system. *Landgraf*, 511 U.S. at 267-68. There are, however, different degrees of retroactivity. It is one thing to regulate present or future pension plan withdrawals, as in the MPPAA cases. It is quite another to impose a new liability—arising entirely from past participation in a benefit plan—on a company no longer in the business. The difference is substantial, and has been referred to occasionally as the difference between secondary and primary retroactivity. *See Landgraf*, 511 U.S. at 293 n.3 (Scalia, J., concurring); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-220 (1988) (Scalia, J., concurring). Primary retroactivity, which is exemplified by the Coal Act, presents a far more significant threat to our traditions of fair notice, finality and repose.

In addition, the period of retroactivity is significant because, once a transaction is completed, the parties' interest in finality and repose increases with the passage of time. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Reg.*, 496 U.S. 18, 40 n.23 (1990). For example, in upholding the retroactive correction of a "mistake" made by an immediately preceding Congress in revising the estate tax laws, the Court emphasized that "Congress acted promptly and established only a modest period of retroactivity." *United States v. Carlton*, 512 U.S. 26, 34 (1994); *see also Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 731 (1984). As applied to Eastern, the Coal Act attaches an entirely new liability, without notice, to employment relationships completed more than thirty years

[4] Thus, in almost every society, retroactive laws have been considered suspect. *See* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 328-330 (1996); BENTHAM'S THEORY OF LEGISLATION 146-47 (C. Atkinson ed. & trans. 1914); FULLER, *supra*, at 80.

ago.

Given the nature and extent of its retroactivity, the Coal Act squarely implicates "the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266, 271 (noting that in "contractual or property rights . . . predictability and stability are of prime importance").

B. There Is No Rational Basis for the Liability Imposed on Eastern.

The Government does not contend that Eastern made any express promises of lifetime health benefits, or that Eastern caused the funding crisis that prompted the Coal Act.[5] Instead, the Government offers a series of justifications for the Coal Act that purport to connect Eastern with the "expectation" that a "tradition" of benefits would continue indefinitely, and to establish that Eastern received certain benefits from its participation in the coal industry. Fed Br. at 30-31, 33. These arguments go far beyond anything this Court

[5] While conceding that Eastern made no express promises, the Government makes passing reference to Senator Rockefeller's assertion that health care benefits were "implicitly promised" in 1950 in exchange for the UMWA's acquiescence in the mechanization of the mines. Fed. Br. at 21, 31; *see also* Combined Fund Br. at 26; Peabody Br. at 7, 27-30. This alleged "exchange" is contradicted universally by historians. *E.g.*, MAIER B. FOX, UNITED WE STAND: THE UMWA 1890-1990, at ch. XVI (1990); KEITH DIX, WHAT'S A COAL MINER TO DO? THE MECHANIZATION OF COAL MINING chs. 6-7 (1988); MORTON S. BARATZ, THE UNION AND THE COAL INDUSTRY 71-74 (1955). It is also inconsistent with representations made by the UMWA and BCOA to this Court in prior cases: *See* Br. for Pet. UMWA at 7-9, 12, 59; Tr. of Oral Arg. 2-3; Br. Amicus Curiae for BCOA at 11; *UMWA v. Pennington*, 381 U.S. 657 (1965) (No. 64-48). *See also* Br. for Resp. UMWA at 3, 7, 13, 29, *Pennington v. UMWA*, 393 U.S. 983 (1968) (No. 68-558). The genesis of this fictional agreement appears to be presentations by the UMWA and BCOA, the principal beneficiaries of the statute, to the Coal Commission, JA 259a n.1, 265a, and to Congress, *Coal Comm'n Report on the Health Benefits of Retired Coal Miners, Hr'g before the Subcomm. on Medicare and Long-term Care of the Senate Comm. on Finance*, 102d Cong. 40, 49, 279, 297 (1991). No source material has ever been cited.

approved in *Turner Elkhorn* and, if accepted, would leave Congress with essentially unlimited power to enact retroactive legislation.

1. Mere "Expectations" Cannot Support Eastern's Liability.

As its principal justification for application of the Coal Act to Eastern, the Government contends that Congress could have concluded that Eastern contributed to a reasonable expectation that lifetime health benefits would always be available to miners and their dependents. Fed. Br. at 29-30.[6] While recognizing that Eastern's obligations to its former employees were limited to the payment of defined contributions to the UMWA plan, the Government invokes the principle that Congress is not bound by the "express terms of pre-existing private contracts" in the sphere of economic regulation. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986). The Government also asserts that, irrespective of the limited nature of Eastern's prior agreements, Eastern was part of a "tradition" of continued provision of health benefits by the coal operators through the years. Fed. Br. at 30-31, 33; *but see* note 19 *supra*.

As a matter of common sense (and sound policy), the reasonable expectations of the parties to a fully executed agreement cannot be determined independently of the terms of the agreement. *See Connolly*, 475 U.S. at 235 (O'Connor, J., concurring) (noting that expectations of employee benefits

[6] The Government refers to various findings or "conclusions" of Congress, and asserts that they are insulated from review by the Court. *See, e.g.*, Fed. Br. at 21-22, 32-33. These "conclusions" are simply statements by several individual Senators that exemplify the risks of retroactive legislation by "characteriz[ing] past conduct of private citizens." *Landgraf*, 114 S. Ct. at 1498 n.20 (*quoting Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-514 (1989)). As such, they are not findings of Congress, and in any event do not fall within the "policy making" expertise of Congress to which deference is due. *Id.* In fact, Congress made only one legislative finding, namely that "it is necessary to . . . identify [the] persons most responsible for plan liabilities." Pub. L. No. 102-486, §19142(a)(2), 106 Stat. 3037 (1992).

in the face of contrary plan language are not "easily traceable to the employer's conduct"). Any contrary rule would cede to Congress a virtually unrestricted legislative power to enact retroactive legislation to meet so-called reasonable expectations derived from fictional promises, unsupported (and indeed contradicted) by the parties' express agreement.

Therefore, even if Congress had made a finding that miners had a "reasonable expectation" of lifetime health benefits, such a conclusion could not have rested on the conduct of companies like Eastern.[7] Eastern never undertook to provide retiree health benefits, but merely to make specified contributions through 1965 to the UMWA plans to be distributed at the discretion of the trustees. The issue then becomes whether due process permits the imposition of retroactive liability for greatly expanded retiree health benefits merely because Eastern was *present* when the trustees first provided health benefits to anyone. Surely, however, it must be arbitrary to rest liability on the convenient fact that some historical event—like employer contributions to early multiemployer benefit plans—may have initiated a "tradition" that was followed and significantly expanded by employers after Eastern left the business. Such liability could not be justified by any concept of spreading costs to parties that caused a harm or an injury, nor as an allocation of liability to parties that reasonably should have expected to pay.

Contrary to the Government's assertions, this is not a case, like *Turner Elkhorn,* where damages were imposed on an employer for injuries suffered by employees as a result of

[7] In making this assertion, Eastern is not requesting the Court to engage in "courtroom factfinding," or to second guess an economic or social policy judgment as to which reasonable minds might differ, as the Government suggests. *See* Fed. Br. at 21-22, 32-33. Rather, Eastern seeks a determination of the constitutional significance of essentially undisputed facts concerning its historical participation in the coal industry. *See, e.g., Lopez*, 514 U.S. at 562.

exposure in the mines. 428 U.S. at 24-25.[8] Indeed, in *Turner Elkhorn*, the Court noted that retroactive liability for damages unrelated to an employer's conduct "would present difficulties not encountered in our prior discussion of retroactivity." *Id.* at 24. Nor is it a case like *Carlton*, where the executor of an estate took advantage of a provision in the estate tax laws that he should have known was a mistake, 512 U.S. at 28, 32, or *Concrete Pipe,* where a company voluntarily chose to participate in a multiemployer pension plan years after the plan members became subject to contingent withdrawal liability under ERISA, 508 U.S. at 608-09, 612, 639-40. Finally, this is not a case like *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, where Congress merely required the railroads to pay Amtrak's costs incurred in honoring (at the railroads' request) free travel passes that the railroads had previously issued to their employees, and from which the railroads enjoyed an ongoing benefit. 470 U.S. 451, 477 (1985). In sharp contrast to the foregoing cases, the Coal Act reaches back and imposes liability on Eastern merely because it agreed, more than thirty years earlier, to make specified contributions to a UMWA benefit plan to be distributed at the discretion of the trustees.

Finally, it is fanciful to suggest that the liability imposed by the Coal Act reasonably could have been anticipated by companies like Eastern. Given the span of retroactivity under the Coal Act, the Government's reliance on "expectations" to justify the Coal Act ignores the essential principle that parties should know the possible consequences of their acts. *See generally Landgraf*, 511 U.S. at 266. Without some reasonable temporal limit to the reach of retroactive statutes, the risks presented by inadequate notice are compounded. Indeed,

[8] While the Black Lung Benefits Act imposed liability on current operators with respect to former employees, each operator had the option—despite its causal contribution to miner injuries—to withdraw from the industry prior to the effective date of the statute and avoid liability. *Elliot Coal Mining Co. v. OWCP*, 17 F.3d 616, 620 n.3 (CA3 1994).

collective bargaining and other employment relationships would be seriously compromised if parties could not be confident that a past agreement, no matter how guarded or limited, would not form the basis for retroactive liability imposed by a legislature. If mere "participation" in providing a contract benefit to employees is a sufficient springboard for a subsequent, retroactive mandate to provide expanded benefits beyond the terms of the agreement (and well after its completion), then no employer or employee can ever justifiably rely on the finality and boundaries of a contractual undertaking.

2. Eastern Created No Plan Liabilities.

Purporting to rely on *Concrete Pipe*, the Government further argues that Eastern's Coal Act liability is rational because it redistributes to Eastern a liability that Eastern created by the provision of "service credits" to its employees. Fed. Br. at 31. In contrast to the situation in *Concrete Pipe*, prior to at least 1974 the accumulation of *any amount of* "service credits" did not provide any miner with a vested, enforceable right to health care benefits, and thus could not have led to the creation of any liability.[9] Because no amount of employment could have provided an employee a vested right to health benefits until well after Eastern's departure from the coal industry, Eastern is readily distinguished from the employer in *Concrete Pipe*. *See* 508 U.S. at 608, 638. Eastern did not create a liability by the employment of miners and then "shift" its responsibilities to remaining plan participants.[10]

[9] *See* Eastern Br. at 4-5. Indeed, the employment periods that qualified for "service credits" were also subject to retroactive modification and revision at the discretion of the trustees. *See* RA 1016; *compare* JA 264a *with* RA 892.

[10] In fact, EACC continued to mine Eastern's former coal reserves, making all of the contributions to the UMWA plans that Eastern would have made had it remained in the industry. Eastern Br. at 6-7.

3. Liability Cannot Be Justified by Virtue of Any Profit or Other Benefit Derived by Eastern.

The Government asserts that liability was properly imposed on Eastern by the Coal Act because Eastern "profited" from the "miners' labor and concessions given in exchange for better health benefits,"[11] and also from "the labor peace and industry-wide mobility of miners that were facilitated by the mechanism of portable service credits." Fed. Br. at 31-32. Once again, however, this cannot justify the retroactive liability imposed on Eastern. All companies "profit" from the labor of their employees, just as all employees "profit" from the benefits provided by their employers. If the mere existence of such "profit" justified the Coal Act, then Congress's power to rewrite expired contracts would be limitless. There is no connection, contractual or otherwise, between the "profits" that Eastern earned by employing the assigned miners from 1946 to 1965 and the need for health care by the miners and their dependents in the 1990s.

Similarly, the Government incorrectly contends that Eastern's receipt of substantial profits from its relationship with EACC "strongly reinforces the constitutionality" of retroactively imposing liability on Eastern. Fed. Br. at 35. The exclusive basis for Eastern's retroactive Coal Act liability, however, is its employment of the miners in question—the oft-repeated "pay for your own" premise

[11] The Government's assertion that the miners accepted lower pensions in exchange for better health benefits is legally irrelevant and factually unsupported. The only source cited for this alleged "concession" is the Executive Summary to the Coal Commission Report, which itself fails to cite any primary source for the assertion. In fact, the UMWA Funds and the BCOA represented to this Court in briefs submitted in *UMWA Health & Retirement Funds v. Robinson* that "eligibility standards and benefit amounts [were negotiated] for the first time" in 1974, and that previously all such determinations were made exclusively by the fund's trustees. Br. for Pet. UMWA Funds at 6-7; Br. Amicus Curiae for BCOA at 5-6; *Robinson*, 455 U.S. 562 (1982) (No. 81-61).

emphasized by the Respondents. *See* RA 2324 ¶30. Eastern's liability is not related to its relationship with EACC after 1965. *Id.* Congress considered the extent and circumstances in which control of a signatory operator might lead to liability, *see* 138 CONG. REC. S17603 (1992), and no liability attaches to Eastern on that basis. As shown by the plain language of the Coal Act, a parent corporation is liable for the burden of a subsidiary only if the parent was related to the subsidiary at the time the subsidiary ceased to exist, 26 U.S.C. §§ 9701(c)(2), 9706(a), or as of the date of the Coal Act's passage, § 9704(a). Because Eastern sold EACC to Peabody in 1987, and EACC continued to exist as a viable company, the only entity possibly subject to Coal Act liability because of its relationship with EACC is Peabody.[12]

C. The Coal Act Was Mere Political Expediency.

Finally, the Government suggests that the Coal Act properly imposed retroactive liability on Eastern because Congress could have concluded, following the veto of the industry-wide tax, that it was necessary to achieve an adequate solution to the funding crisis that was being addressed by the Act.[13] Fed. Br. at 34. Eastern has no way of assessing the correctness of this political calculation.[14] But to recognize

[12] Even if this Court were to rule that Eastern is entitled under 26 U.S.C. § 9706(f)(6) to obtain indemnification or contribution from Peabody or EACC, as the Government asserts, Eastern would remain primarily liable. The constitutionality of a statute cannot rest on the ability of a party wrongly burdened in the first instance to seek recompense from culpable parties of unknown financial resources.

[13] The inclusion of the pre-1978 signatories was not considered at any public hearing, debate, or in any legislative proposal until July 29, 1992 (the day the floor amendment adding pre-1978 signatories to the liability scheme was passed), and only then as an alternative to the industry-wide tax. 138 CONG. REC. S10783 (1992) (remarks of Sen. Rockefeller); STAFF OF HOUSE COMM. ON WAYS & MEANS, 103D CONG., FINANCING UMWA COAL MINER "ORPHAN RETIREE" HEALTH BENEFITS at 24 (Comm. Print 1993).

[14] In fact, less than seven percent of all beneficiaries were assigned under the Coal Act to the group of pre-1978 signatories known as "super-reachbacks." RA 1562.

that imposing liability on Eastern was politically expedient in no way supports the constitutionality of the Coal Act. Surely the political difficulty of finding other funding sources cannot justify the retroactive singling out of Eastern to solve an economic (or political) problem that it played no role in causing. *See Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (mere efficiency will not determine constitutionality). Otherwise, Congress would have unlimited power to reach back and impose liability on particular companies that made no contribution to the problem being addressed to avoid the politically unpopular option of a broader tax. *Cf. Landgraf*, 511 U.S. at 267 n.20.

For the foregoing additional reasons, the Coal Act as applied to Eastern violates the Due Process Clause.

III. THE COAL ACT EFFECTS A TAKING.

Because the Government views the Coal Act as mere economic regulation, it suggests that *Connolly* and *Concrete Pipe* are dispositive of Eastern's takings claim. This argument, however, does not address the essential character of the Coal Act—as applied to a company that has not been in the coal business for some years—as a direct appropriation of property, rather than mere economic regulation. Nor could Eastern have foreseen the Coal Act decades ago, and thus the statute dramatically disrupts Eastern's reasonable investment-backed expectations.

A. The Coal Act Is More Than Ordinary Regulation of Eastern's Property.

The Takings Clause requires the government to pay just compensation whenever it appropriates private property for a public purpose. To determine whether an impermissible taking has occurred, the Court must first review the nature of the government action. In doing so, the Court has traditionally distinguished between government action that directly appropriates property and government action that

merely regulates the uses made of that property.[15] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). The distinction between regulation and appropriation is fundamental.

Regulation manages and directs ongoing conduct; it governs the present usage of property. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1913 (1986). Under the Court's precedents, a statute that regulates ongoing conduct is subject to a Takings Clause test that balances the extent of the property right interference against the governmental interest advanced by the regulation. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). Thus, in rejecting a challenge under the Takings Clause to the MPPAA in *Connolly*, the Court said:

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others . . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

475 U.S. at 223; *see also Concrete Pipe*, 508 U.S. at 642-43.

Appropriations, by contrast, do not govern the uses of property and merely transfer property from one party to another or to the government for some purported public purpose.[16] *See* LAURENCE H. TRIBE, AMERICAN

[15] Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 392 (1922), it was generally thought that the Takings Clause did not apply at all to ordinary regulation, because as Justice Holmes noted, the "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every [exercise of its police power]." 260 U.S. at 413. In *Mahon*, however, the Court established the principle that regulation may violate the Takings Clause if it goes "too far."

[16] Of course, Congress has broad power under U.S. CONST. art. I, § 8, cl. 1 to "lay and collect Taxes" for the "common Defence and general Welfare of the United States." This Court, however, has recognized that a limited or targeted tax, such as the "premium obligation" involved in this case, may be "so arbitrary as to constrain to the conclusion that it [is] not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment." *Brusaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916).

CONSTITUTIONAL LAW at 588 (2d ed. 1988) (noting "constitutional law's undisputed condemnation of any law attempting to take property from A. and give it to B.") (internal quotation marks omitted).This is true by definition of a statute that applies to entities that are no longer engaged in the prohibited conduct, or are no longer participants in the industry governed by the statute.

As applied to Eastern, the Coal Act has the character of a direct appropriation—even though it arises from a statute that does regulate in some of its applications. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *see also Dolan v. City of Tigard*, 512 U.S. 374, 393-96 (1994); *Nollan*, 483 U.S. at 837; *cf. Concrete Pipe*, 508 U.S. at 648-49 (O'Connor, J., concurring). The Coal Act does not manage or direct Eastern's relationship with the UMWA plans. Instead, the statute seizes Eastern's funds (its property) and gives it to the Combined Fund to provide health care to a defined group of coal industry retirees and their dependents, resurrecting employment relationships long since defunct. If this essential nature of the Coal Act as applied to Eastern could be changed simply by labeling it a *mere* "regulation," then the second branch of the Court's taking jurisprudence (regulatory takings) would entirely eviscerate the first (direct appropriations).

B. The Nexus Requirement Is Applicable and Is Not Satisfied.

A direct appropriation is a taking requiring compensation unless there is a "nexus" between the conduct of the property owner and the harm addressed by the government action. *See Dolan*, 512 U.S. at 386; *Nollan*, 483 U.S. at 837; *Webb's*, 449

U.S. at 155, 163.[17] The nexus requirement ensures that a few persons are not singled out to bear a burden which in all fairness should be borne by the public at large. *Nollan*, 483 U.S. at 835 n.4.

The Government disagrees that the nexus requirement applies at all because this case involves an appropriation of money.[18] But the Fifth Amendment protects "property," not just real property, and there is no reason a different rule should be applied because money rather than land is involved. *See, e.g., Webb's*, 449 U.S. at 163-64 (money); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens on personal property). Apparently recognizing this, the Government also asserts that the Coal Act does not violate the Takings Clause because Congress reasonably concluded that "pre-1978 employers were partly responsible for retired miners' expectation of continued benefits and for the financial crisis in the Trusts." Fed. Br. at 44-45. However, as explained above, at the time Eastern made contributions to the UMWA plans, beneficiaries were specifically told that benefits could be reduced or eliminated at any time, and benefits were in fact

[17] In the traditional regulatory context, a perhaps less stringent nexus requirement applies, but will generally be satisfied, because the regulation typically will be directed at the harm sought to be avoided. *But see Pennell v. City of San Jose*, 485 U.S. 1, 20-21 (1988) (Scalia, J., concurring in part and dissenting in part)(opining that provision in local ordinance requiring that landlords pay for poverty problems they played no role in creating constituted impermissible taking). Thus, the concern expressed by Amicus, the California Cities and Counties, that application of the nexus requirement in this case will unduly constrain ongoing regulation is unwarranted.

[18] The Government contends that "it is highly significant" that the Coal Act does not appropriate assets directly to the government's own use, but rather distributes Eastern's assets to the Combined Fund. *See* Fed. Br. at 41-42. In fact, the Court has recognized that "taking analysis is not necessarily limited to outright acquisitions by the government for itself." *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *see also Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).

reduced and eliminated from time to time.[19] Additionally, the NBCWAs which Eastern signed specifically limited its obligations to providing per-tonnage contributions to the UMWA fund. *See* Eastern Br. at 3-4. Any expectations in contravention of those agreements cannot reasonably be traced to Eastern, and provide no nexus between Eastern's conduct and the harm addressed by the Coal Act. *See Connolly*, 475 U.S. at 235. (O'Connor, J., concurring).

Eastern's only connection with the beneficiaries assigned to it is that it employed the miners decades ago. Yet, nothing about that employment relationship caused the financial crisis in the UMWA benefit plans that Congress sought to address with the Coal Act. Nor did Eastern's exit from the coal business create any unfunded liabilities for the UMWA benefit plans, *see* Section II.B.2 *supra*. Because the Coal Act singles out Eastern to pay for problems that it played no role in creating, the nexus requirement is not satisfied, and the Coal Act, as applied to Eastern, effects a taking.

C. The Coal Act Interferes with Eastern's Investment-Backed Expectations.

Regardless of whether the Court considers the Coal Act a direct appropriation of property or a regulation, it is appropriate to consider the extent of the statute's disruption of Eastern's investment-backed expectations. This inquiry examines whether a property owner had any realistic opportunity to anticipate the government action and to adjust her conduct to avoid or minimize its adverse effect. *See*

[19] The Government notes that "with a few brief exceptions" the 1950 W&R Fund provided health benefits to miners throughout their lives. Fed. Br. at 5. *But see* Eastern Br. at 5 n.9 (citing contrary examples). The Government does not contest, however, that the miners' spouses and dependents, which make up more than 70% of the Combined Fund's beneficiaries, RA 1561, did not receive lifetime health benefits until at least several years after Eastern stopped participating in the UMWA plans, *see* Eastern Br. at 4 n.7, and only then as a result of specific provisions of a collective bargaining agreement. *See Robinson*, 455 U.S. at 567.

Babbitt v. Youpee, 117 S. Ct. 727, 734 (1997) (Stevens, J., dissenting). Here, the Coal Act imposes a harsh new liability on Eastern that it could not have foreseen in 1965.

The Government asserts that the Coal Act did not interfere with Eastern's investment-backed expectations because, at the time that it was contributing to the UMWA benefits plans, Eastern should have foreseen, based on the government's prior actions, that "Congress might again impose additional obligations on coal operators [with respect to such plans]." Fed. Br. at 47. The Government refers specifically to President Truman's 1946 takeover of the coal mines and the subsequent creation of a fund to provide health benefits to miners,[20] the Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* (the "Taft-Hartley Act"), and the Government's subsequent surveys of coal miners' health care needs. The Government also refers to ERISA, though ERISA was enacted long after Eastern had ceased mining coal in 1965.

On the basis of these indications of federal government involvement in the industry, the Government invokes the statement in *Connolly* that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 475 U.S. at 227. The "regulated field" justification, however, has been applied only in circumstances that involve the modification of an established regulatory scheme.[21] In *Connolly*, employers continued their participation in multiemployer pension plans after the enactment of ERISA, a comprehensive federal regulatory framework, had already introduced the possibility of withdrawal liability.

[20] The operators had every reason to consider the 1946 takeover to be a taking. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

[21] *See, e.g., Ruckelshaus*, 467 U.S. at 1006-1007 (entity gaining benefit from voluntarily divulging trade secret to EPA has no investment-backed expectations that secret will not be disclosed); *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958) (no investment-backed expectations where company voluntarily participated in subsequently amended federal insurance program).

When a subsequent amendment (MPPAA) adjusted the terms and conditions of withdrawal liability, the Court readily concluded that participants could have foreseen that the withdrawal scheme might be modified. 475 U.S. at 227.

Unlike the situation in *Connolly*, however, there had never been, prior to the Coal Act, any regulatory scheme governing the provision of retiree health benefits in the coal industry, or in any other industry.[22] In fact, the initial plan established by the Secretary of Labor and the UMWA in 1946 required the miners themselves to fund their own health benefits through payroll deductions. JA 263a. The subsequent Taft-Hartley Act merely authorized companies and unions to establish separate welfare plans to be administered by independent trustees. 29 U.S.C. § 186. It did not, in contrast to the pension requirements of ERISA, regulate the funding of such plans, or require mandatory vesting, the provision of defined benefits, or any withdrawal or termination liability. Moreover, the fact that "surveys" of miners' health care needs were conducted hardly foreshadowed the Coal Act's subsequent imposition of liability on companies that had left the coal business entirely.

The Government's suggestions, therefore, reduce to the proposition that any prior Government attention to an industry provides fair notice that sweeping, retroactive liability may be imposed at any time in the future. The Court has never gone so far, and such a rule would eviscerate any protection of reasonable investment-backed expectations. It is particularly unreasonable to suggest that an operator such as Eastern could have foreseen that Congress might impose liabilities arising out of completed transactions in the coal business—without regard to when the operator had left the mining business or the scope of the commitments made to the miners by the operator.

[22] *See* GAO, EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE NO. GAO/HRD-90-92 at 3 (Mar. 1990).

Finally, the Government contends that, because Eastern continued to receive dividends from EACC, it should have anticipated that EACC's ongoing liability for contributions to the UMWA benefit plans might result in liability to Eastern for employment relationships terminated before EACC was created. Fed. Br. at 47-48. The Government provides no rationale for this contention, and it is contrary to common sense notions of investor expectations. No corporate parent would expect to bear *any* liability arising from conduct of an independent and well-capitalized subsidiary, such as EACC. Furthermore, the Coal Act imposes liability on Eastern solely based on Eastern's employment of miners in years prior to 1966. It is not sensible to suppose that Eastern could have anticipated in 1965, or in 1987 (when Eastern sold EACC to Peabody) for that matter, that Congress would introduce a "pay for your own" approach in 1992 that would reach employment relationships that terminated between 1946 and 1965. To suggest otherwise is contrary to longstanding principles of finality and repose on which Eastern had every reason to rely.

For the foregoing additional reasons, the Coal Act as applied to Eastern violates the Takings Clause.

CONCLUSION

For the reasons stated in Eastern's initial brief and in this Reply Brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN T. MONTGOMERY
Counsel of Record
JOHN H. MASON
ROBERT DANIEL O'CONNOR
DALILA ARGAEZ WENDLANDT
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000

L. WILLIAM LAW
SARA JOHNSON MYERS
EASTERN ENTERPRISES
9 Riverside Road
Weston, MA 02193
(781) 647-2300